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CITATION OF CASES

Thomas v. Turner's Adm's 87 Va. 1, 12 S.E. 149 (1890) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 1592

B. B. WOODSON, TRUSTEE IN BANKRUPTCY FOR STERLING DECKER AND MARY JANE DECKER, PARTNERS, T/A BERKELEY COMMUNITY BUILDERS

Petitioner

v.

GEORGE GILMER

Respondent

Brief in Opposition to Granting Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

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To The Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States

George Gilmer, the Respondent herein, submits his brief in opposition to the granting of a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and asks that the Petition of B. B. Woodson, Trustee, the Appellant, be denied.

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

Three of Appellant's four reasons for granting a Writ are primarily based upon alleged conflict of the lower court's decision with applicable laws of the Commonwealth of Virginia, and the fourth upon an alleged important question of United States Bankruptcy law which he asserts has not, but should be, decided by this Court.

We note that the Referee, The District Court, and two of the three Fourth Circuit Judges are Virginia lawyers, and Justice Butzner of the Fourth Circuit was formerly a Judge of a Court of Record in Virginia.

The three (3) alleged decisions of the lower court in conflict with applicable state laws require that new findings of fact be made contrary to the findings of the lower court before the question of alleged conflict is present. Appellant attempts to supply this by reciting his version of facts allegedly gleaned from the record, which he said in a former brief contains approximately twenty-three hundred pages, and from which we count ten lines cited or quoted in his petition to this court. His statement of fact varies substantially from those found in the court below.

The question of Federal Bankruptcy law which allegedly has not, but should be decided by this court likewise requires new findings of fact be made to substantiate his position.

ANALYSIS OF APPELLANT'S STATED REASONS FOR GRANTING WRIT OF CERTIORARI

Reason No. 1

Appellant alleges the Deed of Trust of March 27, 1961, is void because of "fraud presumed" in the attorney-client relationship, and that the lower court had not required Gilmer to overcome the presumption of fraud as required by state law. Appellant argues that Decker would not have signed the Deed of Trust but for this relationship.

It was not established or found as a fact, as alleged, that ". . . Decker would not have signed the deed but for this relationship." To the contrary, Judge Dalton found (Appellant's Appendix, Page 65), "However. . . . we do not agree that Gilmer abused his influence in his dealings with Decker" and (Appellant's Appendix, Page 66), "The financial plan arranged by Gilmer, Adams, and Decker, including the March 27, 1961, Deed of Trust did not materially curtail Decker's business activities and in fact, Decker has testified that it helped him. Decker has at no time indicated that the Deed of Trust was detrimental to his interests. Upon Decker's default, Gilmer was required to pay the bank over $247,000.00 on Decker's notes secured by the Deed of Trust."

When testifying before the referee, Julian Hickman, who made the original findings of fact in this matter, Decker was asked: (Tr May 8, 1962, P. 129, L. 3)

> "Q. What is the first that you heard about the possibility of a deed of trust on all of your property? Where did the suggestion come from?
>
> A. I think it came from Mr. Gilmer, first, not, perhaps, at his suggestion but the mention of the

fact that it was being discussed came from Mr. Gilmer.

Q. So far as you are concerned?

A. Yes, sir.

Q. Do you recall what reason Mr. Gilmer gave or what he said concerning a deed of trust?

A. I think he said that Roscoe Adams was worried about some of the things that I had done or the way some of the things were going and that they felt that the line of credit should be secured with the deed of trust.

Q. What do you mean the way some of the things were going?

A. I think it certainly—when it was said to me I would certainly be aware of the fact that the outside investments that I made, that have been discussed, were not approved by Mr. Gilmer or Mr. Adams or my wife, and subsequently were not well advised. I think the statement refers to those type of operations. I think insofar as the statement came partially from Mr. Gilmer and partially from Mr. Adams, certainly Mr. Adams' part of it referred to my overdraft at the Bank, and as he mentioned today some of these things, National Homes not doing this and the Stone Company not doing that."

Continuing on page 133, Line 2,

"Q. What was your feeling about taking this deed of trust or giving this deed of trust?

A. I have—I concurred with what Mr. Gilmer said in terms of personal friendship that existed between us, and I also felt that where supplies were putting up material and were anticipating a profit that Mr. Gilmer's help and risk was greater than

his expected return, and for that reason I always cooperated about steps of that sort that were suggested.

Q. What, if any, feeling did you have toward your other general creditor's relationship to this deed of trust?

A. I felt that if I worked I could pay it and that the deed of trust would not prevent me, individually, from paying the other creditors; I felt it would help me, individually. A number of creditors were willing to let me work it out, a few weren't; I felt that, and I felt that all of them were put in a position of equality, even though outside the security. I felt it would be to the best interest of all of them. . . ."

Continuing at page 148, beginning at line 23,

"Q. Prior to that time—prior to March 27, 1961, had you advised Mr. Gilmer, or, as far as you know did he have any knowledge that you were having any kind of tax difficulties?

A. No.

Q. Now, in your business operation, at any given time you had countless number of accounts due, is that correct?

A. I had a number of them."

At page 154, beginning at line 9, Decker testified as to his attitude in March, 1961.

"I think that the large sum of money I borrowed was bothering me, I certainly felt that insofar as it bothered me at that time, that it was bothering me a great deal more than it was Mr. Gilmer; I think it bothered Mr. Adams a great deal more than Mr. Gilmer. Mr. Adams was constantly reminding me of that and not Mr. Gilmer."

At page 238, line 21, Decker testified,

"Q. Under what circumstances did you consider that there might be future advances?

A. Mr. Adams at that particular moment was very anxious that we make some good sized curtail in the line of credit and after we made those curtailments I anticipated that we would be able to borrow new money; perhaps, not to the extent we had in the past. Also, should anything come up, even before those drastic curtailments were made, of real importance to the organization then loans would be contemplated.

Q. Were there, in fact, future advances made?

A. Advances made in the future, yes."

Again Decker testified at page 242 beginning at line 3,

"Q. If that is true, can you state whether or not you were in better financial condition in the Summer than you were in March of 1961?

A. In actual—Actually we were in better financial position in November than in March, but our financial position was more pressing in November than in March. It is hard to reconcile those two view points, but what I am saying in essence is that in March we hadn't owed people for quite so long as we did in November, so they were more tolerant; also, we weren't paying anyone in March, but by November we had open accounts, unsecured by note, to the extent of $19,000.00, whereas in March it was around $48,000.00, and the last $19,000.00 people felt they weren't being treated as well as the others, the others had been paid, and by virtue of that they were threatening suits."

Mr. Gilmer testified during the hearing on May 8, 1962, beginning at page 24, line 12:

"Q. In March, when the question arose about the deed of trust, we are discussing, did you originate the request for that deed of trust?

A. I don't think I did.

Q. Do you recall how that request for the deed of trust originated?

A. I think Mr. Adams found out about a deed of trust, which he had put on for Kenneth Fox for some $27,500.00, which was to make some improvements out there in Berkeley, and we felt that if he was going to finance as heavily with the Bank and myself as he was that we ought to know about all of his finances, and Mr. Adams and I had a discussion at the bank and we both decided to get some sort of control so we could keep track of what he was doing and what was going on and so we would know what was going on and not find something on the record after it had occurred, which had happened several times.

Q. When that deed of trust was taken, do you know how much you had advanced?

A. I think the advances were about $249,000.00, I have the figures, I have the adding machine slip, but it was in that neighborhood.

Q. What did you say the purpose of taking that deed of trust was?

A. The purpose was two-fold or three-fold. First, to secure the indebtedness, to have a base on which we could continue to finance him, and to try to restrict his operations, as far as possible, to Berkeley.

Q. Did you have a conference with Dr. Decker about this, you and Mr. Adams?

A. Yes, sir.

Q. And was there any objection by Dr. Decker to this procedure?

A. He concurred in it as freely and willingly as I ever saw anyone that I ever prepared a deed of trust for. In fact, he said that he thought it might be a material benefit to him, that he wouldn't be as apt to go on these side ventures. He had bought one lot on Preston Avenue and it is the only lot I remember that he sold at a loss.

Q. At the time you discussed this matter with him and just prior to the execution of the deed of trust, do you know whether any review of his assets and liabilities was made?

A. There was a list of his real estate filed with Mr. Adams, which, when I checked up to write the deed of trust, I found to be substantially correct. I think he had missed putting one or two pieces down, but it was substantially correct and the liens were correct. . . ."

Continuing at page 33, line 8,

"Q. Now, when you had your conference or discussed this matter with Mr. Adams and Dr. Decker, can you tell the Court what Dr. Decker's attitude appeared to be with respect to this deed of trust?

A. Just as cooperative as he could be; he thought the deed of trust would be a benefit to him, he said that he thought it would help him. He entered right into it all the way through, he was just as cooperative as he could be. For a long time back he had been diverting his cash into other things, he would promise to reduce his indebtedness and then when he would get out a good salesman would come along and talk

him into something or an idea would hit him and he would go and spend his money on something else.

Q. Did he express the idea that this deed of trust might hinder his creditors in any way?

A. I never heard it suggested; he said he thought it would help him with his operations in the shape of getting him financing and in the shape of keeping his liquid assets confined to Berkeley Community Builders Project, which had always been his profitable occupation.

Continuing at page 38, line 9,

"Q. At the time you and the Bank arranged for this deed of trust you didn't have any list of Dr. Decker's open liabilities, did you?

A. All I can say is that he didn't know and I do not know, nor do I have any figures to show what they may have been; we were given to understand they were small.

Q. You didn't require Dr. Decker to produce that list?

A. As far as I know he didn't produce it. I think we just took his statement that he had nothing except small, current obligations."

Roscoe Adams of Peoples National Bank testified during the hearing on May 8, 1962, beginning at page 76, line 11:

"Q. What caused you to ask for this deed of trust for $260,000.00, or do you recall whether you requested it?

A. My recollection is that I did request it; in the beginning in our financing the Berkeley Community Builders and of Dr. Decker, we made loans to him for specific houses, as the loans were closed,

the permanent loan with the Mortgage Company were closed, we would get paid and Dr. Decker would come in and make a new loan for a new house. These loans were not being paid as they had in the beginning, and in a period of a few months their entire line had leveled and stayed at that level, and so far as from our standpoint it was not satisfactory.

I discussed this with Mr. Gilmer, the first time when I met him in the lobby of the Bank and later met him on Saturday in his office and I told him I wanted to get the line into shape so we could handle it, and the only way we could do it would be to take security."

The above testimony eminently establishes the fact that the deed of trust in question was requested by the Peoples National Bank, now the Virginia National Bank, and originated on its motion in order that it could continue to maintain Decker's line of credit. There is no suggestion in this testimony, nor has there been suggestion by Decker in any of his testimony, that Gilmer dominated and controlled him. Nor is there any suggestion by Decker that undue influence was exercised over him. We find no testimony in the record which would indicate that any such domination, control or undue influence was exerted. The testimony is, that the bank and Gilmer and Decker agreed upon a plan which was contemplated to help Decker continue in business. The record shows that he was able to continue in business for some time after the execution of this deed of trust and that he was in better financial condition in the fall than he was on March 27, 1961. It appears clear that Decker knew exactly what he was doing when he executed the deed of trust.

Appellant alleges error in Referees' failure to rule

that the Blanket Deed of Trust was fraudulent because of the attorney-client relationship which he said is presumed fraudulent until proven otherwise by clear and convincing argument, which Appellant says Gilmer failed to produce.

Judge Dalton, in his order, went into the question of attorney-client relationship (Appellant's Appendix, Page 65), and quoted from *Thomas v. Turner's Adm's 87 Va. 1 at 13, 12 S. E. 149 (1890)*, showing the burden on the attorney. This is a case cited by Appellant as authority. The court then reviewed the facts and concluded, "Hence, Trustee's contention is unfounded." Gilmer had borne the burden of proof necessary.

We suggest there is no conflict with Virginia law.

Reason No. 2

Appellant cites Virginia State Decisions, (Page 24, his petition), holding that, where several indices of fraud are present in the same transaction, strong and clear evidence will be required of the upholder of the transaction to repel the conclusion of fraudulent intent.

Appellant says, Pages 12, 13, "The District Court found that several badges of fraud existed, but held that Trustees burden of proof has not been met." We find no statement by the District Court that any badges of fraud existed. That Court's statement regarding Trustee's burden of proof related to establishing fraud by circumstantial evidence, which must be "clear and convincing. . . .", (Appellant's Appendix, Page 54). This, Judge Dalton pointed out the Referee had not found. Dalton found the Trustee failed to carry such burden of proof, (Appellant's Appendix, Page 54).

There is no lower court decision in conflict with applicable Virginia law. There are no facts in the record

which will justify Trustee's arguments, nor has there been such finding in the court below.

Reason No. 3

Appellant states that the lower Court's decision that Decker made an assignment of his partnership interest when he conveyed, under the Blanket Deed of Trust, his one-half interest in land and lots, held by himself, The Woods, and The Gilmers, to secure his indebtedness to the bank endorsed by Gilmer, is in conflict with applicable state law. Judge Dalton felt that this question was a novel one under Virginia Uniform Partnership Act. After reviewing the law and the facts, he concluded that Decker intended to convey in trust all of the interest in this land which he had the power to convey—his partnership interest—and that the result is consistent with the subsequent dealings among the bank, Gilmer and Decker. He said that the fact that the deed of trust did not purport to assign Decker's partnership interest is not material. (Appellant's Appendix, Page 62). The decision of Judge Dalton as affirmed by the Fourth Circuit is not in conflict with applicable Virginia law.

It should be noted that the relationship between Decker, the Woods, and the Gilmers was determined to be a partnership by the Supreme Court of Appeals of Virginia in September 1964 after The Corporation Court, a court of record, in Charlottesville, Virginia, had found it not to be a partnership. Decker is the only partner who maintains that when the March 27, 1961, deed of trust was given, he thought there was a partnership. Yet, he gave the deed of trust and he has not renounced it.

Reason No. 4

Appellant urges that the two supplemental deeds of

trust of June 3, 1961 and August 10, 1961, were given to secure an already fully secured antecedent debt. He states this is a question of Federal law not previously decided by this court, but should be.

The Fourth Circuit in affirming Judge Dalton's order ruled as did Dalton that the plan of Decker, the Bank and Gilmer which required the release of lots, as sold, from the Blanket Deed of Trust and permitted the supplemental deeds of trust, not as additional security for a fully secured debt, but as additional security to supplant value of lots released so that the combined security remaining, if not disproportionate, was within the statute. Dalton held the combined security was not disproportionate as to the amount of the debt.

Here again, in order to establish a basis for this court's review, it is necessary to make findings of fact at variance with those found by the lower court, and apply a changed definition of "Fully Secured."

Appellant suggests that Decker's debt was already fully secured when the two supplemental deeds of trust were given. The facts are that the financial plan agreed to by Gilmer, Adams of the bank, and Decker, provided for release of land under the March 27, 1961, deed of trust, and the placing of deeds of trust upon other lot interests. This was done. The District Court found, (Appellant's Appendix, Page 70), "Although the form of the security changed, they are sufficiently close as not to materially alter the legal effect. Although the form of the security changed, its value in relation to the amount of the debts did not. It follows that if the ratio of debt to value of security was not disproportionate under the March 27, 1961, deed of trust, as we have held, a similar conclusion is required with regard to the two supplemental deeds of trust." The debt was no longer fully secured

due to release of lots when the supplemental deeds of trust were given.

We see no novel question of Federal law requiring decision by this court.

STATEMENT OF FACTS

We think that in fairness to the court we should comment upon certain examples of Appellant's Statement of Facts, which in the main vary from those found by the court below.

He states Page 7, that in early 1961, ". . . since Gilmer had played an increasingly larger role as Decker's financier he became greatly concerned about this situation and commenced a two months series of daily consultations with Adams regarding Decker's financial situation." The facts found by the Fourth Circuit and the testimony of Mr. Adams, and of Gilmer and of Decker was that Adams of the bank first became concerned about Decker not reducing his debts and told Gilmer that in order to continue Decker's line of credit, some control was needed. After numerous discussions Gilmer, Adams and Decker agreed to a financial plan which included the March 27, 1961 deed of trust. Thus, the correct facts change the inference made by Appellant. Actually all three agreed to the plan which Adams of the bank initiated. (See Testimony of Decker, Gilmer and Adams under Reason No. 1 above.)

At Page 8, Appellant's petition suggests that the bond and deed of trust of March 27, 1961, the escrow, and reserve accounts were set up to handle all funds connected with the Berkeley Subdivision. This statement is not complete. It does not cover funds of the utilities corporation owned by the Deckers which served Berkeley; funds of Albert Mahanes Co., Inc., the construction com-

pany which constructed streets, grading, etc. one-half owned by Decker; nor does the plan cover control of thousands of dollars which Decker presumably took from his lot sales and building activities which were paid to the construction company (Albert Mahanes Co., Inc.) after March 27, 1961, and up to November 15, 1961, when Decker defaulted; nor several thousands of dollars spent by Decker during the late summer of 1961 to build a swimming pool on his partners land without their knowledge.

Nor does Appellant mention that under the plan there was included a provision for making construction loans to purchasers of lots from Decker secured under the Blanket Deed of Trust, thus permitting available funds, without delay, or cost to the buyers, to expedite Decker's sales.

At Page 8 his petition, Appellant says that Decker's only source of personal income was restricted to releases which Gilmer directed the bank to make to Decker. Actually the record shows that Decker withdrew substantially all of his profit from construction, from the "Escrow" account, as building progressed, so that when a house was completed only sufficient funds for paying his legal fees were usually left. On September 24, 1964, Decker testified at Page 346:

> Q. From what sources did you pay your overhead —telephone, secretary, and the like after March 27, 1961?
>
> A. From exaggerated claims against the various escrow accounts.

At Page 9, Trustee's Brief, he suggests Gilmer forced exercise of Decker's option to purchase additional lots from the partnership. This was optional with Decker and he owed Gilmer many thousands of dollars for lots

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purchased. During the summer of 1961, Decker was told by The Woods' Brothers, partners with Gilmer, Gilmer's son, and Decker that the Woods were considering the option no longer in effect, and Decker asked Gilmer to have it reinstated, which was done.

At Page 10, Appellant's last full paragraph of *"Statement of Facts"* he relates his interpretation of a series of events which occurred just before Decker defaulted and Gilmer had to pay over $247,000.00 as endorser of Decker's notes. Appellant fails to note that the item which caused the bank to foreclose was Decker obtaining a check for $8,300.00 from Gilmer drawn on the escrow account of one Nefos to pay for a package house from National Homes. The check was marked with the Nefos lot number, but Decker took the check to the bank where he applied it to his other accounts instead of applying it to cover the draft from National Homes. After the bank learned of this, they called Decker's notes.

Appellant says that Decker by late fall of 1961 decided to get "disinterested" legal advice to set up a Court supervised receivership. Actually, this was attempted just after the bank called Decker's notes and Gilmer paid over $247,000.00. Such a move would have been valid only with Gilmer's and other creditors' approval. This approval was not obtained or even sought. The efforts were thus ineffective and the court dissolved the receivership. Appellant's statement that Gilmer and other creditors after the attempted Receivership signed a petition for involuntary bankruptcy of Decker and of Berkeley Community Builders partnership is accurate.

APPELLANT'S ARGUMENTS

Appellant's Arguments in the main are his disagreements with the lower court's finding of facts, and Appel-

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lant's efforts to allege facts which will support his citations of law. We agree with the principles of law in most of the cases cited by Trustee. We do not agree that there is sufficient evidence in this case to support his statements of facts, nor do we agree with his interpretations of the cases.

An example of the difficulty of coming to grips with Appellant's arguments follows:

In his Brief before the Fourth Circuit Court of Appeals, he noted that at least 2300 pages of transcribed record were taken in this case. He now argues at Page 18, ". . . *Every page* of the hearing transcript bears witness to Gilmer's domination and control over Decker." In the face of facts found by two Referees, a District Court Judge, and twice by the Fourth Circuit Court of Appeals, (Appellant's Appendix, Pages 113 and 41), and of the testimony quoted above, it would seem that his argument and inferences are not indicative of a temperate understanding of the true nature of this case nor of the serious considerations heretofore given to it by the lower court.

MISCELLANEOUS

Appellant has included as Appendix "L" his statement of procedural aspects of the case. We note and except to his statement Page 187, regarding how the Referee went about certifying the record of his July 3, 1962 order, ending with "for reasons which were not apparent, he merely stated his changed opinion without changing his order or his findings to conform to it." Appellant does not say how he is allegedly aware of the sequences of Referee's mental processes. Referee's findings of facts were certified October 8, 1962. The Fourth Circuit Court of Appeals commented (Appellant's Appendix, Page 114), that these findings were substantially the same as those

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made in his order of July 3, 1962. We think Appellant's suggestion that the Referee certified findings of fact which he intended to change, but didn't, is not justified. There is nothing to support such a statement, nor is there any support for his contention, Page 188, that the Fourth Circuit Court of Appeals reversed the District Court, holding that since the Referee ". . . had not changed the findings on which his original conclusion rested, his original order must stand." No such statement was made by the Court. (The Court's opinion is in Trustee's petition, Appendix I, page 113). We find no suggestion anywhere that the Referee intended at any time to change his findings of fact.

Petitioner, commenting upon "petitions below" at Page 2, states "a requested opportunity for oral argument before the District Court was denied." The facts are that when the Referee certified his two orders and transcripts of the proceedings, he suggested that "if counsel desire to file memorandum of authorities or otherwise plead, it is the Referee's understanding that 10 days are permitted within which to take that action." Appellee filed a brief within the 10 day period. Appellant appears to have failed to file a brief.

Thereafter, Appellant answered Appellee's offer to appear before the District Court, but insisted that both of Referee Hickson's orders not be heard on the same day pointing out that argument before Referee Hickson on only one of the orders had taken from 10:00 a. m. to 4:30 p. m. and that he would like to have at least that much time to argue the matter before the District Court.

The District Court did not deny or grant the time requested by Appellant who as noted had filed no brief or memorandum of Authorities.

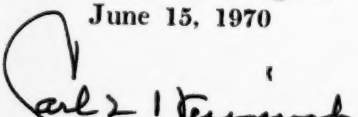
CONCLUSION

It must be concluded that the Appellant failed to substantiate any decision of the Court below in conflict with applicable state law; any important question of Federal law which has not been, but should be decided by this Court; or has decided a question of Federal law in conflict with applicable decisions of this Court.

We request Appellant's petition be denied.

Respectfully submitted,
GEORGE GILMER
By Counsel

Charlottesville, Virginia
June 15, 1970



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